APPENDIX B

(Caption Omitted)

DISTRICT COURT'S DOCKET ENTRY

7/15/66: While CA No's 65-H-760, 841 & 844 have been consolidated under CA No. 65-H-760, motions applicable to each case shall be treated separately for convenience.

Re: CA 65-H-841: Def. Dep. Comm'r's Motion for Summary Judgment is granted, this Ct. being of the opinion that the doctrine of collateral estoppel is not applicable in this instance for lack of mutuality. See *Johnson v. Pullman Co.*, 200 F.2d 751 (5th Cir. 1952); Vol. 1B Moore, Secs. 0.441(3), 0.411(4), 0.412(2), (3).

Mutuality does not here exist as the Stevedore was not an adverse party to the longshoreman in the 3rd party action —not only not an adverse party in fact, but, under *Reed v. Yaka*, 373 U.S. 410 (1963), could not have been made so by amendment of pleadings. Exceptions to the requirement of mutuality created to, when certain conditions are met, allow a party secondarily liable to use in his own defense a judgment exonerating a party primarily liable are not here applicable as the liability of the Stevedore under the Comp. Award is not derivative. See: *Johnson v. Pullman Co.*, supra; Vol. 1B, Moore at pp. 1817 et seq. Pl's Motion for Summary Judgment is denied.

Notice. JN

(Caption Omitted)

DISTRICT COURT'S JUDGMENT

JUDGMENT DISMISSING THE PLAINTIFF'S COMPLAINT

On the 15th day of July, came on to be heard in the captioned matter the Motion for Summary Judgment filed by two of the Defendants, R. J. Shea and Gerald B. Leavey, and the Defendant's Motion for Summary Judgment, and the Court having considered the pleadings, the motions, the replies and the briefs submitted by all parties, is of the opinion that the motion filed by the Defendants, R. J. Shea and Gerald B. Leavey, should be in all things sustained and the Motion for Summary Judgment filed by the Plaintiffs should be in all things denied, now, therefore,

IT IS ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment filed by two of the Defendants, R. J. Shea and Gerald B. Leavey should be in all things sustained and the Plaintiffs' Motion for Summary Judgment should be in all things denied, and therefore, the Plaintiffs' complaint is hereby dismissed with prejudice with costs to be borne by the Plaintiffs.

ENTERED AT Houston, Texas, on this the 15th day of September, 1966-

/s/ JAMES L. NOEL
United States District Judge

APPENDIX C

APPENDIX C

(Caption Omitted)

UNITED STATES COURT OF APPEALS
For The Fifth Circuit's First Opinion

Appeal from the United States District Court for the Southern District of Texas

---

(July 10, 1968)

Before JONES, WISDOM and THORNBERRY, Circuit Judges.

THORNBERRY, Circuit Judge: This appeal involves the applicability of collateral estoppel to administrative proceedings and presents important first-impression questions that materially affect the administration of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901, *et seq.).*

In 1962 Paul Tugwell instituted a court action against A. F. Klaveness & Company, the shipowner, for injuries occurring on the ship. The shipowner impleaded Young & Company, Tugwell's employer, as a third-party defendant. After the jury concluded that Tugwell did not sustain an injury when he fell, a judgment was entered for the shipowner. Subsequently, Tugwell instituted proceedings under the Longshoremen's Act for compensation. His employer made a motion to dismiss the claim because of the previous adjudication in the third-party action that no injury was sustained on the date claimed. The Commissioner refused to apply the doctrine of collateral estoppel and held that Tugwell had sustained an injury upon

the navigable waters of the United States. The court below affirmed. Appellants contend that the Commissioner erred in not applying collateral estoppel to the worker's compensation claim under the Longshoremen's Act. Their position is that a longshoreman should not be allowed to relitigate an issue that was judicially determined against him in an earlier adversary proceeding. We reject this position and affirm the district court.

Although we resolve the issue of the applicability of collateral (sic) to administrative proceedings on narrower grounds than those discussed by the parties, the broad question raised by this appeal is when, if ever, an administrative body is bound by prior determinations of a court. Several decisions by this Court are deemed decisive by the parties. Appellees read *Teichman v. Loffland Brothers Company,* 5th Cir. 1961, 294 F.2d 175 as negating the applicability of collateral estoppel in Longshoremen's proceedings. There we held that an unsuccessful Jones Act suit was not inconsistent with a subsequent action for compensation. In the Jones Act suit the claimant admitted he was not a seaman and the jury found no injury. The Fifth Circuit decision is not controlling because the second suit under the Longshoremen's Act was for a different injury. *Id.* at 177: Appellees urge, however, that our recent decision in *Boatel, Inc. v. Delamore,* 5th Cir. 1967, 379 F.2d 850, interpreted *Teichman* more broadly. In *Boatel* an amphibious worker was injured on a drilling craft in the Gulf of Mexico. He accepted voluntary compensation payments under the Longshoremen's Act and when these payments stopped sued for continuing benefits. When this request was denied, he asserted, for the first time, that the Commissioner had no jurisdiction over the case since he was a "member of the crew." The dis-

trict court remanded to the Commissioner to determine his status and the Commissioner concluded that he was not a member of the crew. Claimant again petitioned the district court for review of the Deputy Commissioner's findings. The court set aside the order and remanded with instructions to render an order that claimant was not entitled to benefit of the Longshoremen's Act as he was clearly a member of the crew. On appeal we affirmed that holding. Another question presented was whether claimant was estopped from asserting a seaman's Jones Act claim for damages since he had accepted benefits under the Longshoremen's Act. Following *Teichman,* we held that he was not estopped. Although *Boatel* has an initial attraction, it is not dispositive. The discussion of the meaning of "a member of the crew" for the purpose of exclusion from the Longshoremen's Act indicates that we were concerned with implementing the policy that the Deputy Commissioner not act beyond the scope of the Longshoremen's Act: Thus, *Boatel* is only another example of the mutual exclusiveness of the acts. *Cf. Bodden v. Coordinated Caribbean Transport, Inc.,* 5th Cir. 1966, 368 F.2d 273, 274. Indeed, collateral estoppel as involved in the instant case would have been a premature consideration in *Boatel. Cf. Arrow Drilling Co. v. Brooks,* 5th Cir. 1962, 303 F.2d 590. It would only be in the subsequent Jones Act suit that the prior findings could be asserted as a bar. Finally, appellants offer *Shea v. Texas Employers' Insurance Association,* 5th Cir. 1967, 383 F.2d 16, to prove that collateral estoppel is applicable to proceedings before the Deputy Commissioner. There we applied collateral estoppel to give effect to a prior state court adjudication that a worker was covered by the Texas Compensation Act. That decision merely follows the mandate

that compensation is payable under the Longshoremen's Act only if recovery for disability is "not validly provided by State Law." 33 U.S.C. § 903. Once the Court knew that recovery under state law was not precluded, it was axiomatic that the injury was not also compensable under the federal law.

Having found prior decisions to be distinguishable, we move to the next level of arguments offered to support the Commissioner's action. It is asserted that the trial and administrative procedures are markedly different and that the duality of remedies envisioned by Congress when injury is occasioned by the conduct of a third party would be aborted by application of collateral estoppel in the instant case. First, it is urged that the interrogatory answered by the jury is not dispositive of the compensation claim. The jury found that Tugwell had not "sustained an injury by slipping and falling upon the deck of the M/S Pleasantville during the early morning hours of July 12, 1958." The Deputy Commissioner found that Tugwell had sustained "an injury resulting in disability while working upon a vessel upon the navigable waters of the United States." One of appellees' arguments seems to be that there can be no estoppel because the compensation remedy is a form of insurance arising out of the employee-employer relationship while the third-party action is a traditional negligence suit. Since it is well settled that collateral estoppel is applicable though the causes of action be different, this contention is too broad. It is only necessary to show that the same fact question was clearly decided in the prior suit between the same parties and that the issue was material to the determination of the prior suit. *Tomlinson. v. Leffkowitz,* 5th Cir. 1964,334 F.2d 262, 264; *United States v. Burch,* 5th Cir. 1961, 294 F.2d

1; *Hyman v. Begenstein,* 5th Cir. 1958, 258 F.2d 502, 510. A second suggested difference is that the traditional negligence issues are not present in the compensation proceedings. Although this distinction is valid, it misconstrues the jury finding in the prior negligence suit. What the jury concluded was that there was no injury, or, as we said when the case was appealed, "that the accident did not occur." *Tugwell v. A. F. Klaveness & Co.,* 5th Cir. 1963, 320 F.2d 866, 868. The question of whether there was an injury, unlike the other negligence issues, is common to both suits. Under 33 U.S.C § 903(a) the claimant has the burden of proving all that is not presumed under section 920. See *Eschbach v. Contractors, Pacific Naval Air Bases,* 7th Cir. 1950, 181 F.2d 860. Section 920 does not presume an injury so the claimant must prove its existence. *Sykes v. O'Hearne, D. Maryland,* 1960, 181 F. Supp. 368, 371.

Though the issue decided by the Commissioner was the same as the one determined by the jury, there are other differences between the two proceedings precluding collateral estoppel.[1] The proceedings before the Commissioner are more "free-wheeling," not only in the quantum of proof necessary to establish a claim, but also in the

[1]It should be noted, however, that our investigation has uncovered decisions holding that administrative bodies are bound by prior court determinations of the same fact issues. *See Lentin v. Commissioner of Internal Revenue,* 7th Cir. 1955, 226 F.2d 695; *Westgate-Sun Harbor Co. v. Watson,* D.C. Cir. 1953, 206 F.2d 458; *George H. Lee Co. v. FTC,* 8th Cir. 1940, 113 F.2d 583; *A. D. Julliard & Co. v. Johnson,* S.D. N.Y. 1957, 166 F. Supp. 577; *City of Jackson v. Holliday,* 149 So.2d 524 (Mss. 1963). Because the basis for our decision was not considered in those decsions and because the policies of the Longshoremen's Act were not applicable to those bodies, we find these cases not controlling.

nature of evidence and procedural rules that are followed. It is well settled that the Commissioner is not bound by the common-law rules of evidence or technical rules of procedure.[2] This laxity is seen in the rule that the admissibility of evidence depends only on whether it is such evidence as a reasonable mind might accept as probative. *Rocker v. Celebrezze*, 2d Cir. 1966, 358 F.2d 119. Thus, hearsay evidence is generally admissible if considered reliable. *Id.* at 119. The paramount difference, however, is that in considering the proof offered by the parties the Commissioner operates under the administrative policy that all doubtful fact questions are to be resolved in favor of the injured employee or his dependent family. *See J. V. Vozzolo, Inc. v. Britton*, D. C. Cir. 1967, 377 F.2d 144, 147; *Howell v. Einbinder*, D.C. Cir. 1965, 350 F.2d 442; *Hancock v. Einbinder*, D. C. Cir. 1962, 310 F.2d 872; *General Accident Fire & Life Ins. Corp. v. Donovan*, D.C. Cir. 1958, 251 F.2d 915; *Friend v. Britton*, D.C. Cir. 1955, 220 F.2d 820; *Hartford Accident & Indemnity Co. v. Cardillo*, D.C. Cir. 1940, 112 F.2d 11. This policy effectuates the intent of the statute to place "the burden of possible error" on those best able to bear it. *See F. H. McGraw & Co. v. Lowe*, 2d Cir. 1944, 145 F.2d 886, 888. Since a jury could not find for the injured party when the evidence created doubt about the injury, we are convinced that there is a substantial variance in the standard of proof required to establish facts before the Commissioner and the jury. The standard before the jury is the preponderance-of-credible-evidence test.

---

[2] *See Southern Stevedoring Co. v. Voris*, 5th Cir. 1951, 190 F.2d 275, 277; *California Ship Service Co. v. Pillsbury*, 9th Cir. 1949, 175 F.2d 873; *Green v. Crowell*, 5th Cir. 1934, 69 F.2d 762; *Pan-American World Airways, Inc. v. O'Hearne*, E.D.Va. 1963, 221 F. Supp. 515.

Although we cannot ascribe a legal label to the burden before the Commissioner, the administrative policy indicates that it is a less stringent standard of persuasion.

A substantial variance in the burden of proof has precluded the application of collateral estoppel in other situations. The best example is the effect of estoppel as between criminal and civil proceedings. Indeed, appellants cite one of these cases, *Amos v. C.I.R.*, 4th Cir. 1965, 350 F.2d 358, to show that an adminstrative body is bound by collateral estoppel. There in a prior criminal suit the taxpayer had been found guilty of tax evasion. The court in *Amos* held that the taxpayer was collaterally estopped to deny that he was guilty of fraud in a subsequent civil suit over a fraud penalty. *See* also *Moore v. United States*, 4th Cir. 1966, 360 F.2d 353. The decision refutes rather than supports appellants' contentions. The court emphasized that collateral estoppel was applied because the burden of proof in the criminal case was more stringent than in the subsequent civil action. The instant case involves exactly the reverse situation since the burden of proof in the administrative proceeding is less than in the prior civil action. This reverse situation invokes the other rule developed in the criminal-civil cases that the Government is not estopped to raise in a civil proceeding an issue it lost in a criminal case because the burden of proof in the criminal case is greater than in the civil action. *Helvering v. Mitchell*, 1938, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917; *Tomlinson v. Lefkowitz, supra* at 265. By the same reasoning, the fact that a worker could not convince a jury that he had suffered an injury should not estop him from attempting to convince a Commissioner that he was injured inasmuch as the standard

of persuasion is less before the Commissioner than before the court.

Therefore, since we are persuaded that the applicable legal rules enable a claimant to establish the existence of an actionable injury before the Commissioner more easily than in a civil tort action, we agree with the district court that on the facts of this case the doctrine of collateral estoppel is inapplicable.

AFFIRMED.

(Caption Omitted)

UNITED STATES COURT OF APPEALS
For The Fifth Circuit's Second Opinion

Appeal from the United States District Court for the Southern District of Texas

(August 19, 1968)

ON PETITION FOR REHEARING

Before JONES, WISDOM and THORNBERRY, Circuit Judges.

PER CURIAM: Appellants' motion for rehearing in the above styled case is DENIED except that page 7 of the slip opinion dated July 10, 1968, is modified to read as follows:

in considering the proof offered by the parties the Commissioner operates under the statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee or his dependent family. *See J. V. Vozzolo, Inc. v. Britton,* D.C. Cir. 1967, 377 F.2d 144, 147; *Howell v. Einbinder,* D.C. Cir. 1965, 350 F.2d 442; *Hancock v. Einbinder,* D.C. Cir. 1962, 310 F.2d 872; *General Accident Fire & Life Assurance Corp. v. Donovan,* 1955, 220 F.2d 820; *Southern Pacific Co. v. Sheppeard,* 5th Cir. 1940, 112 F.2d 147; *Hartford Accident & Indemnity Co v. Cardillo,* D.C. Cir. 1940, 112 F.2d 11. This policy effectuates the intent of the statute to place "the burden of possible error" on those best able to bear it. *See F. H. McGraw & Co. v. Lowe,* 2d Cir. 1944, 145 F.2d 886, 888. Since a jury would not be directed to find for the

injured party, as a matter of policy, when the evidence created doubt about the injury, we are convinced that there is a substantial variance in the standard of proof required to establish facts before the Commissioner and the jury. The standard before the jury is the preponderance-of-credible-evidence test. Although we cannot ascribe a legal label to the burden before the Commission, the statutory policy, as interpreted by the courts, indicates that it is a less stringent standard of persuasion.

A substantial variance in the burden of proof has precluded the application of collateral estoppel in other situations. The best example is the effect of estoppel as between criminal and civil proceedings. Indeed, appellants cite one of these cases, *Amos v. Commissioner*, 4th Cir. 1965, 360 F.2d 358, to show that an administrative body is bound by collateral estoppel. There in a prior criminal suit the taxpayer had been found guilty of tax

(Caption Omitted)

UNITED STATES COURT OF APPEALS
For the Fifth Circuit's Third Opinion

Appeals from the United States District Court for the Southern District of Texas

(December 9, 1968)

ON JOINT PETITION FOR REHEARING EN BANC

Before JONES, WISDOM and THORNBERRY, Circuit Judges, as to Young & Company and Texas Employers Insurance Association v. R. J. Shea, Deputy Commissioner of Labor, et al.

Before COLEMAN and GODBOLD, Circuit Judges, and RUBIN, District Judge, as to Bertram W. Watson and R. J. Shea, Deputy Commissioner v. Gulf Stevedore Corporation, et al.

JOINT PER CURIAM: The Petition for Rehearing en banc filed in both of these cases is DENIED, and no member of the panel nor judge in active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

However, because of the assertion of counsel that "the opinions in these two cases are directly in conflict" and are both contrary to the decision of another panel of this circuit in *Goins v. Noble Drilling Corporation*, 5 Cir., ____ F.2d ____, (No. 24,928, July 10, 1968) we con-

sider it appropriate to add a few words to prevent others from drawing the same erroneous conclusions.

Watson and *Goins* involved the same issue: the scope of judicial review of the Deputy Commissioners findings of fact under the Longshoremen's and Harbor Workers' Compensation Act. In both cases an identical standard was applied. In *Goins* it was stated as follows: " '[T]he findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole.' " *J. P. Goins v. Noble Drilling Corporation*, 5 Cir., ___ F.2d ___, (No. 24,928 at page 5, slip opinion). In *Watson*, the criterion was put in almost the same words: "The settled formula is that the decision of the administrative agency should be accepted unless there is no substantial evidence on the record as a whole to support it." *Watson v. Gulf Stevedore Corp.*, 5 Cir., No. 25,007, at page 3, slip opinion. The sole difference between these cases is that in *Goins* the record lacked substantial evidence to support the findings of the Deputy Commissioner while in *Watson* the evidence was presented and it was substantial.

The scope of judicial review of the Deputy Commissioner's findings under the Longshoremen's and Harbor Workers' Act was repeatedly held, prior to the adoption of the Administrative Procedure Act, to be the same as the latter one set forth as a general standard in the A.P.A.[1] See, for example, our 1943 opinion in *Luckenbach Gulf S.S. Co. v. Henderson*, 133 F.2d 305 and such decisions of other courts as *Voehl v. Indemnity Ins. Co.*, 1933, 288 U.S. 162, 53 S.Ct. 380; *Lowe v. Central R. Co. of New Jersey*, 1940, 3 Cir. 113 F.2d 413. And this was the stand-

[1]Administrative Procedure Act §10(e), 60 Stat. 237 (1946), 5 U.S. C.A. §1001 et seq. (1946).

ard applied by the United States Supreme Court in a case to which the prior law was applicable even though it was decided after adoption of the Administrative Procedure Act. *Cardillo v. Liberty Mut. Ins. Co.,* 1947, 330 U.S. 469, 67 S.Ct. 801.

Hence, as we have previously said, the Administrative Procedure Act did not change the scope of judicial review of the Deputy Commissioner's findings. The substantial evidence rule, properly applied, as we think it was in *Watson* as well as in *Goins,* fully effects the intention of Congress and amply safeguards the rights of litigants.

In *Young* the issue was entirely different: the question was whether the injured worker was precluded from recovery before the Commissioner by a collateral estoppel resulting from an earlier jury determination adverse to him. Concluding that the doctrine of collateral estoppel was inapplicable, the opinion in *Young* set forth expressly several reasons for this result. One of these was, "The standard of persuasion is less before the Commissioner than before the court." *Young & Co. v. Shea,* 5 Cir., No. 24,249 at page 8, slip opinion. This distinguishes the amount of evidence necessary to persuade the Commissioner under the Act from that required to persuade a jury. Nothing said there intimates any modification of the substantial evidence rule this Court has consistently applied to the question of whether the Commissoner's determination should be accepted on review.

In reviewing a decision of the Commissioner and in applying the substantial evidence rule, the reviewing court must take into account that the standard of persuasion is less before the Commissioner than it would be in a jury trial of the same issue. This is because Congress has

indicated an intention to require less.[2] The policy of the Act that all doubtful questions are to be resolved in favor of the longshoreman is to be considered in determining whether there was substantial evidence before the Commissioner.[3] Having taken this into account, the reviewing court applies the same rule to *review* of administrative proceedings that an appellate court applies to review of jury verdicts, and, in this respect, as we said in *Watson,* the *scope of review* of jury verdicts and of administrative findings is the same. It is a non sequitur to suggest that the same standards must apply to determine the burden of persuasion before the trier of fact as those applicable when an appellate court reviews the record.

---

[2]33 U.S.C. §901 et seq.

[3]See the cases cited in Young & Co. v. Shea, 5 Cir., No. 24,249 at page 7, slip opinion.

(Caption Omitted)

UNITED STATES COURT OF APPEALS
For the Fifth Circuit's Fourth Opinion

Appeal from the United States District Court for the Southern District of Texas

ON SECOND PETITION FOR REHEARING

(December 12, 1968)

Before JONES, WISDOM and THORNBERRY, Circuit Judges.

APPENDIX D

APPENDIX D

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

(33 U.S.C.A. Secs. 901, et seq.)

§ 914(h) HEARINGS

The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be

made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

§ 920. Presumptions

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another. Mar. 4, 1927, c.509, § 20, 44 Stat. 1436.

§ 921. Review of compensation orders

(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy com-

missioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

§ 923. Procedure before the deputy commissioner

(a) In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

THE ADMINISTRATIVE PROCEDURE ACT
(5 U.S.C.A. Secs. 500, et seq.)

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any

oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386.